SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 519

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

DON NIVENS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTION PRESENTED

The sole question here presented is whether a common carrier by rail can insulate itself from F.E.L.A. liability for the negligent design and maintenance of its trackage and roadbed by the expedient of leasing such trackage from its parent corporation, and delegating to the parent corporation the responsibility for maintenance and repair.

STATEMENT OF THE CASE

Although Petitioner's Statement of the Case is accurate insofar as it goes, Respondent believes elaboration is due in order to silhouette the portion of the Trial Court's charge under attack against the overall factual situation under review.

The Trial Court correctly instructed the jury that the Petitioner was:

> "* * * under a duty to exercise ordinary care to furnish its employees with a safe place to work, and it is liable for any injury that results in whole or in part from the negligence of the officers, *agents*, or employees of the employer * * *" (R. 1053, emphasis ours).

Although Petitioner phrases the issue differently, the meat of the question posed is whether Petitioner, by delegating another carrier as its agent to design, maintain and repair its roadbed, can insulate itself from the negligence of its agent so delegated to perform a portion of its operational activities.

We believe that elaboration is due Petitioner's Statement of the Case in this aspect.

The Facts Regarding the Relationship of Petitioner and Southern Pacific Company, and the Negligent Design of the Roadbed

It was stipulated that the Southern Pacific Company owns ninety-six (96%) percent of the stock of the Petitioner, and that the use of its roadbed aided and benefited the Petitioner in its operational activities (R. 152). Subject to the granting of proper certificate by the ICC authorizing the Petitioner to abandon operation of and to remove its line of railroad between Commerce, Texas, and Sherman,

Texas, and to extend its operations over the line of the T.&N.O. R. Company (now Southern Pacific Company), the Petitioner entered into a "Lease" allowing joint use of the track where the derailment occurred[1] (L., §3.7, p. 5). Thereby, the Petitioner was given "joint and equal right" to operate its trains under their own power, subject to Southern Pacific control and direction, over the tracks between Plano, Texas and Sherman, Texas, which were characterized as "joint facilities" (L., §1.1; §2.2, p. 1). The "joint facilities" were to be maintained and repaired by Southern Pacific (L., §1.2, p. 1), but the use of the joint facilities by Petitioner was to be subject to "dangers and hazards that may at any time arise from the condition thereof or any defects therein" and the Petitioner assumed "full liability as to its own train operations for the use and condition of such 'joint facilities' just as though it were operating its own tracks" (L., §2.8, p. 2). Unless performing services solely for one of the parties, each officer, agent and employee of Southern Pacific (other than train crews) while engaged in the management and maintenance of the "joint facilities" was to be deemed the joint employee of Southern Pacific and Petitioner (L., §3.3, p. 3).

The term "liability" included in its definition injuries to persons, "arising by reason of the existence, construction, repair, use, operation or abandonment of the 'joint facilities'" (L., §3.1, p. 3). A proviso on liability stated that in case of damage arising in the operation of the Petitioner's train over the "joint facilities", the Petitioner "shall assume full responsibility for the condition of the

1. This lease is referred to in a footnote on page 9 of Petitioner's Application for Certiorari. It was erroneously omitted by the printer from the Appendix, but is a part of the formal record. It was admitted into evidence at R. 953 and is part of the record before this Court via certified supplement of the Clerk of the Court of Appeals. We will refer to the lease by pages and paragraphs following the abbreviation "L".

'joint facilities' and any defect therein." (L., §3.4(c), p. 4). As the Petitioner has indicated, the date of this instrument was September 26, 1953 (L., p. 1).

At Milepost 284.30, the place of derailment, there had been previous washouts in April, 1942, and August, 1945 (R. 353). In 1947, there was another washout at this point, and the Houston office of the T.&N.O. suggested the giving of considerable thought to the installation of a P.C.T. at the location (R. 356; a P.C.T. is a packed cord trestle, R. 744). The suggestion went on to say that a sixty (60) foot trestle would fit into the drainage situation and give the railroad considerably more waterway than it would have under the proposed method of handling by Superintendent F. E. Hoefer of Ennis (R. 356). The advisability of installing such a trestle was reaffirmed by Engineer Earl Perkins, witness for the Respondent, who testified that the factors involved in the area were such as to cause a scouring action of the embankment at the drain, and that the erection of a properly riprapped trestle sixty (60) feet in length in 1947 would have alleviated the problem of scouring and washout (R. 384-385). It was the opinion of this witness, that under the existing circumstances, the system that the railroad installed in 1947 had too small an opening, causing retardation of the water, and a consequent boiling and scouring action that eats into the fill of the railroad structure (R. 375-380).

Notwithstanding the "ought" judgment of the November 12, 1957 communication, the railroad company decided to install the less efficient culverts that washed out in 1964, because the packed cord trestle structure would cost more than the inadequate culvert type arrangement.[2]

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2. See Defendant's Exhibit 18 (last page), a letter of, November 22, 1947 to H. J. McKenzie from F. E. Hoefer. This instrument was erroneously omitted by the printer from the Appendix, but is a part of the formal record. It is before this Court via certified supplement of the Clerk of the Court of Appeals.

It must be said that the improper design of the drain was a "condition" or "defect" of the "joint facilities" that the Petitioner assumed full responsibility for by contract. This responsibility, we shall demonstrate, was also fixed by the terms of the F.E.L.A.

ARGUMENT AND AUTHORITIES

Petitioner has unquestionably sought to delegate to Southern Pacific its responsibility for safely designing, maintaining and repairing the area of track causing the derailment in question. Although unable to extract a "no recourse" agreement from its parent company Southern Pacific, the Petitioner here seeks a construction of §51, 45 U.S.C., which will abrogate its nondelegable duty to its employees of furnishing them a safe place to work. This Court has clearly and soundly condemned such carrier efforts to restrict by contract or otherwise the ambit of their nondelegable duties imposed by the F.E.L.A.

The reach of the decision in *Sinkler*[3] goes beyond common law principles to declare that an F.E.L.A. employee should be assured that all combining their exertions with him in the unitary enterprise of railroading will conduct themselves with sufficient care to avoid endangering his safety. This principle, said this Court, exists not because the employer is necessarily to blame, but because justice demands this measure of responsibility to one who gives his labor to the furtherance of the enterprise of railroading. In *Shenker*[4] the nondelegable duty of an employer to provide its employees with a safe place to work, even when they are required to go on to the premises of a third party over which employer has no control, was held to extend

3. *Sinkler* v. *Missouri P.R. Co.*, 356 U.S. 326, 329, 2 L. Ed. 2d 799, 802-803.

4. *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U.S. 1, 7, 10 L. Ed. 2d 709, 714-715.

to a foreign car that the employer railroad contended had not been on its premises a sufficient time for an inspection to have been made.

After approving the opinion in *Texas & Pacific R. Co. v. Archibald*,[5] the Court in *Shenker*[1] continued to hold the following:

> "As Texas & Pacific makes abundantly clear, there is no de minimis rule called into play on account of the brevity of the sojourn of the P&LE train in Mahoningtown station, since the length of the sojourn is irrelevant to the duty owed to the employee working with the car. Nor is it an answer to claim that the B&O lacked control or supervision over the P&LE car. Such arguments have never supported an exception to the employer's duty to provide a safe place to work. Chicago Great Western R. Co. v. Casura, supra (234 F.2d p. 447); Beattie v. Elgin, J. & E. R. Co., supra (217 F.2d p. 865); Terminal R. Asso. v. Fitzjohn, (C.A. 8 Mo.) 165 F.2d 473, 476, 477, 1 ALR2d 290, and have no greater relevance here with respect to the duty to provide reasonably safe cars, see Annotation, 41 LRA 101. The B&O may adequately protect itself by refusing to permit its employees to service the car."
>
> "* * *
>
> "If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk."

The Petitioner seeks to distinguish *Sinkler*[4] on the ground that it was concerned with only operational ac-

5. *Texas & Pacific R. Co. v. Archibald*, 170 U.S. 665, 42 L. Ed. 1188.

tivities of the Belt Railway, after the employer railroad turned over its switching operations to it. This contention disregards this Court's holdings to the effect that the employer's nondelegable duty to furnish a safe place of work extends to structural defects. For example, in *Bailey*,[6] the design and structure of the floor of a bridge was held to afford an insufficient footing for a section foreman that was required to unload a hopper car while positioned on it. In the *Fitzjohn* case[7] injury resulted to an employee, while working on premises not under the control of his employer, on account of insufficient clearance between cars standing on a track, and pipes or standards attached to a concrete wall adjacent to the tracks. After rejecting the contention that the employee was a "lent servant" to the owner of the switch track, the Court thus extended the duty of the employer to the structural defects in the place where it required the employee to work:

> "Since plaintiff was an employee of defendant at the time of his injury the fact that the premises where plaintiff was sent to work did not belong to and were not under the control of defendant did not absolve defendant from liability for their unsafe condition." (165 F.2d 476-477).

The continuing contentions of the Petitioner that it is responsible only for defects that had been in existence for a sufficient length of time for the Petitioner to have actually or constructively known thereof, and to have had opportunity to repair them, are untenable for two reasons. First, this exact contention was obviously made by the railroad in *Shenker*,[4] as evidenced by the dissenting opinion which accurately points out that the majority opinion

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6. *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 352, 353, 87 L. Ed. 1444, 1446-1447.

7. *Terminal R. Association of St. Louis* v. *Fitzjohn*, 165 F.2d 473 (cited in *Shenker*).

created not simply the duty of inspection, but an absolute duty of discovery of all defects (374 U.S. 14, 10 L. Ed. 2d 719). Second, in *Shenker*,[7] the employee did not argue that notice of the defect to the owner of the foreign car was also sufficient notice to the employer (374 U.S. 12, 10 L. Ed. 2d 717). It is inferable that the majority opinion was in part rested on this premise, even though counsel did not argue it to the Court. The Respondent has continuously contended that the actions of T.&N.O. or Southern Pacific were the actions of the Petitioner, in every conceivable respect.

This latter contention finds strong support in the lease agreement between these parties (supra, 2-3). The lease and surrounding facts show that the Petitioner desired to abandon and remove its line of railroad between Commerce, Texas, and Sherman, Texas, and for all practical purposes to substitute the line of T.&N.O. or (Southern Pacific) as its line of railroad between these points (supra, 2-4). The lease agreement but echoed the law in providing that in conducting its own train operations, the Petitioner would be fully liable for the condition of the track, "just as though it were operating its own tracks" (L., §2.8, p. 2, supra, p. 3). Under this agreement, the Petitioner in effect said to Southern Pacific, that where it lodgest, Petitioner would lodge: that Southern Pacific's people should be Petitioner's people,[8] and that Southern Pacific's responsibility for defect and condition of the track would be Petitioner's responsibility. The Petitioner had the option of continuing the use of its track between Commerce and Sherman, which presumptively it had constructed in a safe manner, or of abandoning this trackage (with consent of the ICC), and substituting therefor the Southern Pacific track as the sole place of work of its em-

8. Ruth 1:16-18.

ployees operating trains between the two points. In choosing the latter option, the Petitioner accepted the trackage of Southern Pacific, warts and all, and by requiring its employees to work thereon, assumed the nondelegable duty of furnishing them a reasonably safe place of work.

At this point, by operation of law as well as under the specific terms of the lease, Southern Pacific became the agent for Petitioner, and Petitioner became liable for the conduct of its agent under §51. It should not be permitted to avoid this liability by seeking to accept the benefits of its trackage arrangement with Southern Pacific, but avoid its burdens on the grounds that it had no part in the construction of the roadbed and track.

In essence, the position of the Petitioner is that it owes its employees no greater duty in furnishing a safe place of work than the landowner owes a licensee. The Petitioner readily admits that it would be responsible for negligent maintenance of the track, although this duty would be entirely that of the Southern Pacific, but Petitioner would disavow responsibility for the structural defects of the same track, likewise due solely to the actions of Southern Pacific. This distinction, we believe, would have been untenable at common law. To suggest it could have any application under the F.E.L.A. is to fly directly in the face of *Shenker*[2] and *Sinkler*.[3]

The Court properly charged the jury that Petitioner was fully responsible under the F.E.L.A. for conduct on the part of Southern Pacific Company in the maintenance and design of the roadbed (R. 1055).

Since the Trial Court's charge was directly in line with this Court's holdings in *Sinkler*[3] and *Shenker*,[4] we will not unduly lengthen this presentation by discussing Petitioner's point on harmless error. The Trial Court correctly charged on the law applicable to this case.

CONCLUSION

Acceptance by this Court of the position urged by Petitioner would in effect be to issue a blank check to carriers governed by the F.E.L.A. enabling them to "tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity". It is respectfully urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of Respondent was mailed, postage prepaid, properly addressed to counsel for the Petitioner, Mr. Jack W. Flock, c/o Ramey, Brelsford, Flock, Devereux & Hutchins, P. O Box 629, Tyler, Texas, on this the ..... day of ..... 1970.

.....
Of Counsel